RECENT ENGLISH DECISIONS.

In the Prerogative Court.[1]

NORTON AND OTHERS *vs.* BAZETT.

A testator wrote his will, and signed it in the presence of two persons summoned by him for the purpose; they took the will into an adjoining room to sign their names; the rooms communicated by a door, which was left open. There was no proof that the testator did actually see the witnesses sign their names: *Held*, that the signature of the witnesses was not made in the presence of the testator.

A question was raised in this case, whether a will, which had been signed by the testator in the presence of two persons, was also so subscribed by them in his presence as to constitute a due compliance with the words of the 9th section of the Wills Act, 1 Vict. c. 26, viz: "such witnesses shall attest and shall subscribe the will in the presence of the testator." Probate of the will in question had been refused on motion and it was now propounded by the executors in order to take the opinion of the court as to its validity. The will was drawn up by the testator himself in a very formal and circumstantial manner; and it appeared from the evidence of the attesting witnesses that the testator, who was a merchant in the city, after having been engaged in writing, called them into his room, which was separated from the office in which they sat, but communicated with it by a door, which was habitually kept open, and was so at the time of, and during the whole of the transaction; that on entering the room the testator was sitting at a table with his back to the wall separating the two rooms; that he said to them, "This is my last will and testament which I have made, and I require you to witness my signature;" that two sheets of paper, written on, were lying before him, on one of which, at the end of the will, he signed his name in the presence of both the deponents; that he then handed the sheet of paper to one of them, and requested him and his fellow-witness to sign their names, and to add the words, "Witnesses to the signature of William Norton;"

[1] From the London Jurist, for August 16, 1856.

that the table in the deceased's room was full of papers, and so, for convenience in signing, one sheet of the will was taken into the next room or outer office, the other was left on the deceased's table; that the deponents then both signed their names to the last sheet in each other's presence, standing whilst they did so at the corner of a desk which, of the others in the office, was nearest to the doorway leading into the other room. It appeared that this desk could be seen from some parts of the other room, but not from that part in which the deceased was sitting when the witnesses left for the purpose of subscribing the will, but that the chair in which the deceased sat was not above two yards from the partition wall, and that if he had moved a yard to his right hand from his chair, he could have seen the witnesses as they wrote their names; but whether he did so or not, the witnesses were unable to say. When they had both signed their names, one of them took back the paper to the testator, who then looked at the signatures, and made some remark as to the mode in which one of the witnesses had written his name; that the deceased was then standing up at the side of his table, which was parallel with the partition wall, with his back to the wall, and exactly in front of the chair on which he had been sitting when the witnesses left the room, but how long he had kept his chair the witnesses could not say; they neither saw nor heard him during the time they were out of his room, but the door remained open during the whole of the transaction. The witnesses were absent from the deceased's room about two minutes, the time required to sign their names.

Sir *J. D. Harding*, Q. A., and *Twiss*, in support of the will, contended that this amounted to a constructive if not an actual presence, and would have been a due execution under the Statute of Frauds; and that the case was distinguished from those where the testator was lying in bed or incapable of moving; here the deceased was found standing up, and there was nothing to rebut the presumption that he might have moved from his chair, and thus have seen the witnesses subscribe their names. They cited *Shires* vs. *Glasscock*, 2 Salk. 688; *Casson* vs. *Dade*, 1 Bro. C. C. 99; *Tod* vs. *Winchelsea*, 2 Car. & P. 491; *Winchelsea* vs. *Wauchope*,

3 Russ. 441; *Newton* vs. *Clarke*, 2 Curt. 323; and *Tribe* vs. *Tribe*, 1 Robert. 781.

Jenner and *Deane*, in opposition to the will, submitted that in order to bring the case within the doctrine to be gathered from the cases cited, it must be shown that the witnesses were at the time of subscribing their names within the possible range of sight of the testator. They cited *Davy* vs. *Smith*, 3 Salk. 395; *Doe* vs. *Manifold*, 1 Mau. & S. 294; and *In the Goods of Colman*, 3 Curt. 199.

Sir J. DODSON, after stating the facts: The question is, whether what took place, and the circumstances connected with it, render this a sufficient compliance with the 9th section of the Wills Act. It has been said that the law, notwithstanding the passing of the Wills Act, is the same as that resulting from the Statute of Frauds. That may be so, but the question has been fully discussed since the passing of the Wills Act, viz: in one of the cases cited at the bar—*Newton* vs. *Clarke*. The case of *In the Goods of Colman*, also cited, is very similar to this, and in both cases it was held that the statute had not been complied with. It is clear that the deceased could not have seen the witnesses at the time they subscribed their names, nor they have seen him, had he remained sitting in his chair where the witnesses left him. But it has been argued that the deceased might have moved from his chair, and then he could have seen them; but there is no proof that he moved. The witnesses only say he might have moved; and I think it would be going too far for the court to presume he moved, and so saw them sign; it would go beyond the decided cases. There must be proof that the testator was in such a position with relation to the witnesses that it was physically possible for him and them to have seen each other. The evidence adduced does not establish that fact, and I have no alternative, although I do so with great reluctance, but to pronounce against the probate of this will. The superior court may feel that it has a wider discretion. Decree the costs out of the estate.